

1 that I'd need a response.

2 MR. MILLER: May I speak?

3 JUDGE LUTON: Yes.

4 MR. MILLER: These letters are -- the only
5 difference between these letters and the ones that you just
6 rejected is that ones in Exhibit 5 appear to have made their
7 way to the Commission either by being filed directly with it
8 or copies being sent. One of these says -- 16 of them deal
9 with -- there are 18 letters from members of the public.
10 Sixteen refer to the Liz Randolph matter. One, which is the
11 Willison letter at page 5, is a duplicate of the Willison
12 letter that you have already rejected in Exhibit 5, page 5,
13 and is a favorable letter from an occasional listener in
14 Indiana, Pennsylvania that for the life of me I can't
15 understand its relevance. But looking at those that deal with
16 Liz Randolph, the one at page 5, "Gentlemen: Hope Liz
17 Randolph takes your station and the two slimy so-called disc
18 jockeys to the cleaners." That -- I don't know how Your Honor
19 is supposed to make findings on that sort of thing. As to the
20 responsive letter from -- well, yeah, obviously the
21 genuineness and the fact that they're not sworn to also
22 contributes to the problem, but even, even bypassing that for
23 the moment, the only thing different Mr. Berfield offers here
24 in comparison with 5 is a general response by Mr. Meyer, Vice
25 President and General Manager of the station, to the letters

1 | which is not terribly different from the sort of response that
2 | the Commission gives to, to letters from people who complain
3 | about various things. It has nothing, it has nothing whatever
4 | to do with ascertainment. It's a response to a bunch of
5 | letters that came in generally prompted by newspaper articles
6 | concerning the trial.

7 | JUDGE LUTON: And, Mr. Berfield, if your point is to
8 | show -- attempt to show that EZ wasn't really interested in
9 | ascertaining the wishes and desires and hopes and fears of the
10 | community because if it were it wouldn't have written an all-
11 | purpose letter such as Mr. Meyer here wrote in response to the
12 | concerns that are expressed in the various letters, I -- while
13 | the concerns in the various letters are again, for the most
14 | part, those same kinds of things that the Commission doesn't
15 | concern itself with --

16 | MR. BERFIELD: Well, Your Honor, let's look at the
17 | letter on page 7 of Exhibit 6 from Mr. Willison. I mean,
18 | here's obviously a gentleman who's taken some time to write a
19 | fairly detailed letter and he's primarily concerned about the
20 | impact on pre-adolescents and teenagers. I don't see how we
21 | can -- I mean, the Commission itself is quite concerned about
22 | the impact of programming on children. I mean, certainly
23 | children, pre-adolescents and teenagers are part of the, part
24 | of the audience and the fact that they might focus in on the
25 | entertainment programming doesn't mean that they should be

1 excluded from the licensee's concerns. And if people --

2 JUDGE LUTON: Yes, but the Commission's concern
3 about indecency and such things impact on children is
4 manifested in a particular way. The Commission doesn't act on
5 the basis of letters such as we have here by Mr. Willison who
6 simply declares material tasteless, crude, whatever else. The
7 Commission doesn't express its interest in these matters on
8 the basis of letters like that.

9 MR. BERFIELD: Well, I mean, the Commission talks a
10 great deal about community standards and how else -- what is
11 the community standard? I mean, when you have a number of
12 people who've reached the same conclusion in a community it
13 seems to me that has some, some relevance as to community
14 standard, but I repeat that the distinguishing factor about
15 this exhibit, No. 6, is the response and that's really the
16 focal -- would be the focal point of my cross-examination --

17 JUDGE LUTON: That's what I thought.

18 MR. BERFIELD: -- of a response by Mr. Meyer to
19 these letters. That's correct, Your Honor.

20 JUDGE LUTON: But what is Mr. Meyer responding to?

21 MR. BERFIELD: Well, that's --

22 JUDGE LUTON: You have to concern yourself with that
23 in order to determine whether or not his response was
24 appropriate or effective or useful or not.

25 MR. BERFIELD: I'd like, I'd like the opportunity to

1 argue that his response fell somewhat short of what a
2 responsive licensee could or should have done.

3 JUDGE LUTON: Now, I don't know how that could be
4 determined on the basis of the complaints that are stated in
5 these letters by a bunch of people who really say no more than
6 that they didn't like certain programming.

7 MR. BERFIELD: Well, it certainly would be, would be
8 -- an opportunity would be developed on cross-examination of
9 Mr. Meyer.

10 JUDGE LUTON: I don't think so. I'm going to reject
11 6 in its entirety.

12 (The document that was previously
13 marked as Allegheny Exhibit No. 6 was
14 hereby rejected.)

15 JUDGE LUTON: 7. I want to get done.

16 MR. MILLER: That's the one we started with pretty
17 much that got us into the Liz Randolph --

18 MR. BERFIELD: I think that's a Liz Randolph. I
19 think that has to await your ruling, Your Honor, and 8 I
20 believe also is the same circumstance.

21 MR. MILLER: Your Honor, I would not really
22 associate myself with that because you've already ruled that
23 other people's perceptions of the Liz Randolph matter aren't
24 coming in. They aren't pertinent to anything. The fact that
25 Mr. Darkins is a long time public official and a minister

1 doesn't elevate his perception in paragraph 2 over anyone
2 else's. He's certainly entitled to his belief that there's no
3 excuse for such conduct in the media which has a pervasive
4 impact in our society.

5 JUDGE LUTON: I need to hear it again. I need some
6 focus here. I'm sorry, Mr. Miller. I should have let Mr.
7 Berfield go first and tell me what it is he's hoping to
8 accomplish.

9 MR. MILLER: Well, he had started with Exhibit 7 and
10 then was moving on to Exhibit 8 and my objection --

11 JUDGE LUTON: That was 7. That was some while ago,
12 wasn't it?

13 MR. MILLER: Yes.

14 JUDGE LUTON: I need to hear it again. Let's do 7,
15 Mr. Berfield. Tell me what you're doing here.

16 MR. BERFIELD: Mr. Darkins is a City Councilman from
17 Pittsburgh.

18 JUDGE LUTON: Right.

19 MR. BERFIELD: And he's being offered as a, as a
20 community witness on behalf of Allegheny and he lists these
21 specific concerns. Paragraph 2 is concerned about the Liz
22 Randolph matter and that's when we digressed into a more
23 general discussion. And then paragraph 3 is a -- gives his
24 assessment of the programming with particular --

25 JUDGE LUTON: All right.

1 MR. BERFIELD: -- with his particular interests and
2 that's the basis of that offering.

3 JUDGE LUTON: All of which is -- do you have a
4 response?

5 MR. MILLER: Well, paragraph 2, Your Honor is either
6 going to let the Liz Randolph stuff in or you're not. If you
7 don't, it seems self-evidence that paragraph 2 should be
8 excluded. If you do let it in, I don't see how this --

9 JUDGE LUTON: Well, paragraph 2 talks about more
10 than Liz Randolph, particularly your last sentence. He's
11 particularly critical of the use of all kinds of things --

12 MR. MILLER: Yes.

13 JUDGE LUTON: -- during various times including
14 morning -- when he claims young people and children are
15 listening.

16 MR. MILLER: Yes, Your Honor, but to the extent that
17 it deals with the Liz Randolph matter, it doesn't -- it should
18 go out if you don't let the Liz Randolph stuff in. If you do
19 let the Liz Randolph stuff in, I don't see that it eliminates
20 any aspect of it.

21 JUDGE LUTON: I agree. I don't think it should come
22 in in any event.

23 MR. MILLER: As to this --

24 JUDGE LUTON: Again, this is just one of those
25 generalized bleats from a member of the public about a radio

1 station which -- about which he's unhappy.

2 MR. MILLER: To the extent that it goes --

3 JUDGE LUTON: It's not this Commission's business.

4 MR. MILLER: That's my point exactly, Your Honor.

5 To the extent that it goes beyond Liz Randolph, it's in that
6 category as well, so I really --

7 JUDGE LUTON: I don't see any possible relevance no
8 matter which way I rule on the outstanding Liz Randolph
9 matter.

10 MR. MILLER: Yes, Your Honor.

11 JUDGE LUTON: That's what I'm saying with respect to
12 paragraph number 2. With respect to paragraph number 3, this
13 is so vague as to be meaningless. I don't see that it helps
14 any -- it helps in any way in making a judgment about whether
15 or not BZZ has, in fact, lacked outreach to the
16 African/American community and to the disadvantaged. This
17 gentleman, in his opinion, he says it -- but it provides
18 nothing more than his conclusory statement. 7 is rejected.

19 MR. MILLER: Thank you, Your Honor.

20 (The document that was previously
21 marked as Allegheny Exhibit No. 7 was
22 hereby rejected.)

23 MR. MILLER: Exhibit 8 --

24 JUDGE LUTON: These aren't your exhibits, Mr.
25 Miller.

1 MR. MILLER: I'm sorry.

2 JUDGE LUTON: These are Mr. Berfield's. We've got
3 the declaration of Anne McLemore, another member of the public
4 who tells us some things. Mr. Berfield, you go ahead and make
5 a statement so that the record will be clear.

6 MR. BERFIELD: Yes. Ms. McLemore is President of a
7 Pittsburgh chapter of the Coalition of Labor and Union Women
8 representing some 20 different unions in the Pittsburgh area
9 and she's presented as a community witness. She's critical of
10 the -- certain of the programming of the station and she
11 attaches a letter that she wrote back in 1990 on behalf of the
12 Coalition to the station. And it seems to me this is the --
13 her evidence would be material under the renewal expectancy.

14 JUDGE LUTON: All right.

15 MR. BERFIELD: And --

16 JUDGE LUTON: I disagree. 8's rejected.

17 (The document that was previously
18 marked as Allegheny Exhibit No. 8 was
19 hereby rejected.)

20 JUDGE LUTON: Go to 9, Mr. Pitts. It's saying
21 pretty much the same thing, isn't it, Mr. Berfield?

22 MR. BERFIELD: Yes, Your Honor. What was the basis
23 for 8? Was that the same as for --

24 JUDGE LUTON: The same as for --

25 MR. BERFIELD: 7?

1 JUDGE LUTON: Yeah. That -- namely that the concern
2 is not with a matter which is relevant in this renewal
3 context. That is to say, one person's satisfaction and
4 generalized satisfaction or dissatisfaction with station
5 format isn't, isn't probative of anything. It's just another
6 complaint letter. Sexist and discriminatory remarks are
7 offensive -- the Commission -- I'm sorry. I just see any of
8 this as the Commission's business. That's basically the
9 reason I'm keeping this stuff out.

10 MR. BERFIELD: I understand your ruling, Your Honor.
11 Then I then offer Exhibit No. 9 as another community witness,
12 Robert L. Pitts, who's the Mayor of Wilkinsburg. This is a
13 borough that borders the city of Pittsburgh.

14 JUDGE LUTON: Okay. Another one where people are
15 getting it off their chest, so to speak. "You'll find that
16 BZZ doesn't address the real and pressing needs of this area,
17 a lot of problems which are particularly acute." He's not
18 aware of any effort by Pittsburgh radio to address them now.
19 This is something that I'd like to have a response on, if it's
20 relevant or not. Here is a gentleman who maybe taking the
21 view that BZZ's programming is, in fact -- that it falls much
22 shorter than public interest obligations.

23 MR. MILLER: Your Honor, he doesn't -- yes, I agree.
24 This is quite different. However, he doesn't purport ever to
25 have listened to the station. He doesn't -- he says that he

1 knows of no effort or outreach by Pittsburgh radio station BZZ
2 to address such issues. I suspect that neither does President
3 Clinton. And that would mean --

4 JUDGE LUTON: Clinton doesn't live in Pittsburgh,
5 Wilkesburg or whatever it is.

6 MR. MILLER: No, he doesn't. But if the witness
7 says that I've listened to the station for years and they have
8 never ever in the time that I've listened to them dealt with
9 youth related problems or minority youth or drug abuse and
10 drug opportunities, that would provide something that you
11 could make findings on. But simply to have him say without
12 the benefit of any information as to whether he's ever
13 listened to the station, that he knows of no effort or
14 outreach by the station to do various things, it seems
15 irrelevant and incompetent.

16 JUDGE LUTON: What do you say to that, Mr. Berfield?
17 You going to bring Mr. Pitts in here?

18 MR. BERFIELD: Yes. We'd be happy to present Mr.
19 Pitts.

20 JUDGE LUTON: All right. Yes, sir?

21 MR. ZAUNER: May I just add one thing? I think that
22 the best evidence of the effort and outreach by WBZZ-FM is in
23 the exhibits that WBZZ-FM has presented in this proceeding
24 this morning, and that I would object to the statement under
25 the best evidence rule. The fact that he knows of no effort

1 or outreach by Pittsburgh radio station WBZZ is irrelevant in
2 light of the fact that we have exactly in the record what it
3 is that WBZZ's claiming it did with regard to many of these
4 issues.

5 JUDGE LUTON: Do you mean there should be no way for
6 somebody to take a contrary view?

7 MR. ZAUNER: Well, if the contrary view --

8 JUDGE LUTON: Or if a contrary view is taken it has
9 to be based on whatever BZZ has served up?

10 MR. ZAUNER: There is no factual basis for the
11 contrary view while the fact of what they did and didn't do in
12 these areas is in the, is in the record.

13 JUDGE LUTON: Yeah. Well --

14 MR. MILLER: Your Honor, I live in this area and I
15 have -- excuse me. I have no, no information about what most
16 of the radio stations broadcast because I don't listen to
17 them. I don't want to listen to them and I don't care. I
18 could give an affidavit just like this about 98 percent of the
19 radio stations in the Washington metropolitan area and it
20 would be equally valuable.

21 JUDGE LUTON: Okay. Tell you what, we're not --

22 MR. MILLER: i.e, worth 0.

23 MR. BERFIELD: This gentleman is a public official,
24 the Mayor of Wilkinsburg.

25 JUDGE LUTON: Not only that, he's going to be here,

1 right?

2 MR. BERFIELD: We're going to present him in
3 Pittsburgh, yes, sir.

4 JUDGE LUTON: Bring him on down here. Present him
5 in Pittsburgh. Present him somewhere so that he can be cross-
6 examined, he can be asked about all these things, the basis
7 for his knowledge and all that, and if it's determined that he
8 doesn't have anything to say, that will be the result.

9 MR. MILLER: So that one is in, Your Honor?

10 JUDGE LUTON: That one is in.

11 (The document that was previously
12 marked as Allegheny Exhibit No. 9 was
13 received into evidence.)

14 JUDGE LUTON: Now 10.

15 MR. BERFIELD: Exhibit 10 is on a different matter.
16 This is a matter which has not been considered before by the
17 Commission in any fashion and it is a matter that was
18 developed as a result of documents furnished by WBZZ in
19 deposition and it would form the basis for questions in cross-
20 examination of the General Manager, Mr. Meyer, as to the
21 circumstances and possible rule violation by the station of a
22 cable news network broadcast in 1991. And that's -- we're
23 offering this in the context of the renewal expectancy and the
24 GAF case.

25 JUDGE LUTON: Okay.

1 MR. BERFIELD: And they didn't have authority to
2 rebroadcast these programs, but they did anyway.

3 JUDGE LUTON: Okay.

4 MR. MILLER: May I speak, Your Honor?

5 JUDGE LUTON: Yes.

6 MR. MILLER: The Commission's rules prohibit the
7 rebroadcast by a radio or television signal of a signal of
8 another radio or television station. That is not what we have
9 here. Mr. Meyer specifically says in his letter at page 2
10 that BZZ did use some non-broadcast CNN material for a
11 relatively brief period ending just after the President's
12 speech at 9:30 p.m. during the initial phases of Desert Storm.
13 So there's no Commission rule violation here involved. As to
14 -- even if there were, one isolated incident over a period of
15 seven years doesn't seem worth considering. That's even if
16 they were, but there was none. As to the remaining letters,
17 they do not give any indication that there was any rule
18 violation either. They aren't sworn. We would have no
19 opportunity I would assume to cross-examine these people and
20 if --

21 JUDGE LUTON: Where's the rule violation, Mr.
22 Berfield?

23 MR. BERFIELD: It's the, it's the rule on
24 rebroadcast. I thought I had a copy of the rule that was
25 --

1 JUDGE LUTON: But you just told me, Mr. Miller, that
2 in your view there is no rule violation involved here.

3 MR. MILLER: Well, the letter from Mr. Meyer --

4 JUDGE LUTON: I -- isn't that what you just said?

5 MR. MILLER: Yes.

6 JUDGE LUTON: Okay.

7 MR. MILLER: There was no rebroadcast of an over the
8 air --

9 JUDGE LUTON: Okay. You don't need to say anymore.

10 MR. BERFIELD: On the other hand, the person who
11 wrote the letter starting on page 3 of Unistar specifically
12 mentions that WBZZ -- FCC rules and regulations simultaneously
13 rebroadcast or recorded and subsequently rebroadcast portions
14 of news transmissions, so I think there is -- there is a
15 question of fact, I agree, but the rule -- if they did, in
16 fact, rebroadcast, then there is the question of rule
17 violation. I agree there is a question of fact there and I
18 would purport to, to question Mr. Meyer about that on cross-
19 examination.

20 JUDGE LUTON: Wait a minute. I was just asking you
21 to show me -- point me to which rule violation. You mean the
22 mere claim here by --

23 MR. BERFIELD: Well --

24 JUDGE LUTON: -- whoever it is that FCC rules are
25 somehow implicated? That's enough to show that --

1 MR. BERFIELD: It's a rebroadcast. In other words,
2 you can't -- a broadcast station can't rebroadcast the
3 material from another station without its consent.

4 JUDGE LUTON: But is that what happened here?

5 MR. BERFIELD: Well, that's the question of fact to
6 be determined. That's the assertion.

7 JUDGE LUTON: Well --

8 MR. BERFIELD: It's the rebroadcast without consent
9 rule, Your Honor.

10 JUDGE LUTON: Okay. One of the points you made, Mr.
11 Miller, is that even if a rule was implicated here, and I'm
12 not satisfied that it was, even if it was, one time only,
13 isolated, an apology had been made and apparently is of no
14 moment any longer between the two entities involved.

15 MR. MILLER: Your Honor, one rule violation over a
16 period of seven years does not strike me as something that's
17 going to be --

18 JUDGE LUTON: And it's not probative of anything.
19 Okay. So for admissibility purposes tell me why this ought
20 to be excluded if we're going to say that a rule violation
21 occurred? I suppose there's a point at which something is so
22 lacking in probative value until it ought not even be admitted
23 to take up everybody's time. Do you think this -- pardon me?

24 MR. MILLER: I'm sorry. Go ahead. I thought you
25 were asking me to comment on --

1 JUDGE LUTON: I guess I was. Go ahead.

2 MR. MILLER: Again, Mr. Meyer says it was non-
3 broadcast. The unsworn to letter from Mr. Fries offers
4 opinions as to whether a set of facts which is not articulated
5 violates various laws. It's incompetent because it's not
6 sworn to. There's no indication that this person is -- has
7 the requisite qualifications to opine about violations of
8 anything.

9 JUDGE LUTON: I agree. I think that's enough, Mr.
10 Miller. Thank you. Mr. Berfield, without some live bodies in
11 here to shore up the obviously missing pieces here, I'm not
12 going to accept this stuff. I'll give you an opportunity to
13 raise this anew at the time of the hearing with whoever you'll
14 need to raise it with --

15 MR. BERFIELD: Thank you, Your Honor.

16 JUDGE LUTON: -- Mr. Fries and -- he's the one who
17 claimed that --

18 MR. BERFIELD: He wrote the letter, Your Honor.

19 JUDGE LUTON: -- FCC rules were violated somehow,
20 but to simply come in with a letter, with what purports to be
21 a letter, appears to be a letter, authentic and all, it takes
22 more than that to get something into evidence and I'm not
23 going to receive this in the absence of a witness who can be
24 tested so it can be determined that he knows what he's talking
25 about and that he has something useful to say. 10 is

1 rejected.

2 (The document that was previously
3 marked as Allegheny Exhibit No. 10
4 was rejected.)

5 (TAPE 3)

6 MR. BERFIELD: 11 and 12 are kind of together, Your
7 Honor. They do involve the, the Liz Randolph matter and
8 certain litigation and the confidentiality order that was
9 entered into and our assertion that that -- that the conduct
10 of WBZZ in that context of obtaining the confidentiality order
11 violated Commission's rules as to settlement or payment to
12 restrain people from filing complaints or Petitions to Deny.

13 MR. KRAUS: Your Honor, that's exactly the argument
14 that was made by Allegheny in its Petition to Deny, exactly
15 the argument which the Commission rejected in the Hearing
16 Designation Order.

17 JUDGE LUTON: I'm going to -- would you, would you
18 state that for me again, Mr. Berfield? I think may I missed
19 something there. I'm sure I did.

20 MR. BERFIELD: Okay. This is separate from the
21 arbitration matter. The arbitration matter was decided and
22 when to Federal Court and a judge affirmed it. There was a
23 civil law suit brought by Ms. Randolph against the station and
24 I believe certain of the station employees. There was a jury
25 trial. The allegations were -- I think included perhaps

1 | defamation, invasion of privacy. There might have been an
2 | aspect of punitive damages there. She, I believe, was awarded
3 | a large settlement of several hundred thousand dollars. There
4 | has been an appeal filed by the licensee and while the appeal
5 | was pending in local court there in Pennsylvania, the parties
6 | reached a settlement. And as part of the settlement there was
7 | imposed a confidentiality order and in the hearing the judge
8 | made it quite clear that one of the purposes of the
9 | confidentiality order was to have Ms. Randolph not pursue any
10 | kind of action at the FCC and she'd already, a year or a year-
11 | and-a-half before, written just an informal complaint type of
12 | letter to the Commission. And, further, the court order was
13 | that if somehow this even got to be an issue in an FCC
14 | proceeding that Ms. Randolph would not answer a subpoena. So
15 | we presented this information in our Petition to Deny to the
16 | Commission arguing that it violated the Commission rules about
17 | -- and at least a -- and policies in a couple of respects.
18 | First of all, paying someone to not file a, a complaint or a
19 | Petition to Deny in the renewal context, that's something
20 | that's supposed to be brought before the Commission and
21 | approved, the limitations, just expenses only. That was not
22 | done. Secondly, we argued that it -- that in having the judge
23 | rule that Ms. Randolph wouldn't -- not only wouldn't pursue
24 | anything herself, but that she would resist or refuse to honor
25 | a subpoena from the FCC or refuse -- that she had to refuse to

1 cooperate with the FCC, we argued -- got into the -- case and
2 other Commission cases where the Commission has taken a very
3 dim view about people going out and paying money, whatever the
4 sums of money, to, to persuade people not to come forward with
5 information which the FCC might, might consider relevant in a
6 licensee case. We made those arguments in our Petition to
7 Deny in the -- before the Commission and the HDO, the Hearing
8 Designation Order, denied them saying, among other things,
9 saying that there was no indication that Ms. Randolph ever
10 intended to file anything when the -- there was already on
11 file this April 27th letter. So to some degree it raises the
12 same set of legal arguments as does our prior, our prior
13 discussion and I'd be happy to -- I think the arguments that
14 we make in our memorandum on the Liz -- this is a spinoff of
15 the Liz Randolph -- would probably apply there, too, and
16 perhaps the thing to do would be to delay judgment on it. But
17 that's my understanding of the, of the pertinent facts.

18 JUDGE LUTON: Yeah. Well, what is it you're seeking
19 to show here with 11 and 12?

20 MR. BERFIELD: That there was violations -- there
21 was a violation of the rule and the conduct reflect adversely
22 on WBZZ.

23 JUDGE LUTON: That violation of the rule being?

24 MR. BERFIELD: The violation of the rule, paying off
25 someone to -- not to file a complaint at the Commission and

1 also, too, keeping information from the Commission.

2 MR. ZAUNER: Your Honor --

3 JUDGE LUTON: How do these exhibits show those two
4 matters?

5 MR. BERFIELD: Well, Exhibit 13 is a declaration and
6 the -- indicate excerpts from the court hearing. I guess it
7 was a hearing in chambers. It starts on -- I'm sorry.
8 Exhibit No. 12, page 4, indicates that the parties that were
9 at the -- in the judge's chambers and indicates, for example,
10 down toward the latter part of the page, the next to last --
11 the last two paragraphs, that this settlement -- the plaintiff
12 withdrawing their letter of inquiry with the Commission, which
13 I assume is a reference to the, the letter that's in our prior
14 exhibit, and the --

15 JUDGE LUTON: The April 27 letter?

16 MR. BERFIELD: Yes, sir. "And the plaintiff then
17 agrees she will not," -- this is Randolph -- "file a complaint
18 with the FCC. She will not assist anyone in filing a
19 complaint with the FCC. She will in no way directly or
20 indirectly assist anyone. Further, should she be subpoenaed
21 in the unlikely event some party we don't know about files a
22 complaint, she will refuse to testify on the grounds that the
23 court order in this case prohibits her," and so forth. So
24 that's, that's our argument. I would also point out that this
25 settlement was reached just a few weeks before the deadline

1 for people to file Petitions to Deny and are competing
2 applications on the WBZZ renewal.

3 JUDGE LUTON: What's this got to do with BZZ?

4 MR. BERFIELD: Well, BZZ's obviously a party, a
5 party to the, a party to the settlement.

6 JUDGE LUTON: A settling party?

7 MR. BERFIELD: Yeah, obviously.

8 JUDGE LUTON: And -- okay.

9 MR. BERFIELD: I mean, and present at the meeting
10 were the General Manager and the President of EZ, as the court
11 indicates. I mean --

12 JUDGE LUTON: But the plaintiff agreed she will not
13 file a complaint with the FCC. She will not assist -- those
14 are the things that you were ticking off to me.

15 MR. BERFIELD: Yes, sir.

16 JUDGE LUTON: But BZZ becomes implicated because
17 it's presumably on BZZ's behest that the -- that Randolph to
18 those things?

19 MR. BERFIELD: Yes, Your Honor.

20 JUDGE LUTON: To the extent that BZZ requested and
21 Randolph agreed, you would predicate a violation of the
22 Commission's rules possibly?

23 MR. BERFIELD: That's correct. The fact that
24 Randolph agreed is irrelevant if they -- I mean, she might
25 have also violated the rules. I don't know. But if BZZ

1 requested it and certainly we would seek to ask questions of
2 Mr. Meyer and Mr. Box --

3 JUDGE LUTON: Okay. I'm glad I -- I'm sorry. Go
4 ahead.

5 MR. BERFIELD: -- who were, you know, in the
6 courthouse. I mean, that -- I mean, to me it's an
7 extraordinary, it's an extraordinary order in terms of the
8 specific focus on keeping information from the FCC.

9 JUDGE LUTON: Okay. I'm glad I asked you to restate
10 all that for me because I'm certain now that I didn't
11 understand at first. I understand a little bit better now.
12 Okay, Mr. Miller.

13 MR. MILLER: Your Honor, this is the -- first of
14 all, the only characterizations by counsel that we agree with
15 are that the Commission rejected these arguments in its -- the
16 Hearing Designation Order and Allegheny is asking you to
17 reconsider and review the Commission's decision that this was
18 improper.

19 JUDGE LUTON: The Commission rejected these
20 arguments upon what I guess Mr. Berfield would claim was a
21 mistake as to a fact, namely, the Commission was unaware that
22 the April 27 letter was -- or it gave no indication that it
23 was aware of the fact the April 27 letter had been written by,
24 by the time that it made its judgment?

25 MR. MILLER: Yeah, and --

1 JUDGE LUTON: No complaints had been filed or
2 something like that --

3 MR. MILLER: Yeah, and --

4 JUDGE LUTON: -- and, in fact, the complaint had
5 been filed?

6 MR. MILLER: Well, not only that, Your Honor, but if
7 you look at page 11 --

8 JUDGE LUTON: Let me just take a little piece at a
9 time here and I'll let you say everything you've got to say
10 about this. Go ahead, Mr. Miller. I just wanted to be -- to
11 catch up with you.

12 MR. MILLER: And after the Hearing Designation Order
13 declined to do what Allegheny had requested, Allegheny asked
14 Your Honor to certify this very question to the Commission and
15 you declined to do so, so there's just no relevance. Now,
16 this -- the document here which is attached to Mr. Cohen's
17 June 1991 statement, just in case there's any uncertainty in
18 the record, is not the settlement agreement. This is a
19 transcript of a conference in chambers and various
20 requirements here are being articulated by the judge of the --
21 Judge Musmanno. I guess under Allegheny's theory Judge
22 Musmanno is, is a party to this horrendous conspiracy to
23 defraud the Commission as well, but the Commission has ruled
24 and -- there was no violation. There's no problem and it
25 should not become a part of this record.

1 MR. ZAUNER: Your Honor, I think part of the problem
2 here is that Mr. Berfield, probably unintentionally, has
3 misstated the thrust of Section 73.3589 which I think is the
4 rule violation that he's indirectly been alluding to. Section
5 73.3589 refers to threats to file Petitions to Deny or
6 informal objections. It doesn't deal with complaints. The
7 fact that Liz Randolph may have agreed not to file a complaint
8 does not constitute --

9 JUDGE LUTON: It hardly constitutes a threat. Is
10 that the rule you have in mind, Mr. Berfield?

11 MR. BERFIELD: Well, our informal objection -- I
12 mean, how do you -- to me -- to say there's a difference
13 between a complaint and an informal objection, that --

14 JUDGE LUTON: He didn't say that --

15 MR. BERFIELD: Well --

16 JUDGE LUTON: -- I don't think.?

17 MR. BERFIELD: No. I thought that's what he said.
18 But I would also point out that his own colleague, Mr. Wolfe
19 -- if you look at Exhibit No. 11, page 5, Mr. Wolfe on behalf
20 of the Mass Media Bureau wrote in response to this letter and
21 he certainly talks about -- he certainly in the last paragraph
22 construed it as evidence and an intention to file something on
23 the renewal because he specific -- Wolfe specifically told
24 Randolph -- this is Wolfe speaking on behalf of the FCC,
25 specifically told her about the rules for filing informal

1 | complaints, objections, Petitions to Deny. So, I mean, it's
2 | incomprehensible to me that the Commission's Hearing
3 | Designation Order didn't reference these facts, but they did
4 | not. I mean, those are the circumstances

5 | MR. ZAUNER: But the fact that Glenn Wolfe informed
6 | a letter writer that she had a right to file a Petition to
7 | Deny hardly seems to me to rise to a level of significance as
8 | to whether or not this information should be received.

9 | MR. MILLER: Well --

10 | MR. ZAUNER: The fact is 73.3589 prohibits in
11 | exchange for withdrawing a threat to file or refraining from
12 | filing a Petition to Deny or any formal objection. I haven't
13 | seen anything here that indicates that such a payment was
14 | made. Not only that, but all of the information that was
15 | presented here today in Mr. Berfield's exhibits was before the
16 | Commission at the time they made this ruling.

17 | MR. KRAUS: Moreover, Your Honor, the fact of the
18 | matter is that Ms. Randolph had filed a letter of complaint
19 | with the Commission a year earlier which was before the
20 | Commission for, for a substantial period of time, had all of
21 | her allegations in it. I mean, you can't have it both ways.
22 | You can't say that there was some nefarious effort to prevent
23 | the filing of something that was already on file. It doesn't
24 | make sense.

25 | JUDGE LUTON: What do you say to that, Mr. Berfield?